IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 28, 2006 Session

# STATE OF TENNESSEE v. JACQUELINE P. WARLICK

**Appeal from the Criminal Court for Macon County**
**No. 04-66 John D. Wootten, Jr., Judge**

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**No. M2005-01477-CCA-R3-CD - Filed May 17, 2007**

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Following a bench trial in the Macon County Criminal Court, the Appellant, Jacqueline P. Warlick, was convicted of driving under the influence and sentenced to eleven months and twenty-nine days in jail, with the sentence being suspended after the service of two days in confinement. On appeal, Warlick argues that her conviction was obtained in violation of her Sixth Amendment right of confrontation, as recognized by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), and her right under article I, section 9 of the Tennessee Constitution to "meet the witnesses face to face," as recognized by *State v. Maclin,* 183 S.W.3d 335, 343 (Tenn. 2006). Specifically, Warlick challenges the admission of the following evidence under *Crawford* and *Maclin*: (1) her son's statement, which was admitted as an excited utterance, made at the accident scene to an ambulance attendant that he knew his mother was going to wreck because she had been drinking; and (2) medical records from Vanderbilt University Medical Center, admitted pursuant to the Medical Records as Evidence Act, which contained: (a) Warlick's statement to medical personnel that she had consumed alcohol prior to the wreck; and (b) laboratory results from the hospital indicating a blood alcohol level of "183 mg/dL." Warlick further argues that the trial court erred by allowing a state trooper to testify with regard to the analysis and conversion of the blood alcohol test results. After review, we conclude that the admission of the challenged evidence was not error, as the evidence was not "testimonial" within the meaning of *Crawford*, and was properly admitted under a "firmly rooted hearsay exception" and bore "particularized guarantees of trustworthiness." *See Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539 (1980). Warlick's issue regarding the testimony of a state trooper is without merit. The judgment of the trial court is affirmed.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed**

DAVID G. HAYES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Branch H. Henard, III, Nashville, Tennessee, for the Appellant, Jacqueline P. Warlick.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Linda Walls, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

### Factual Background

On November 21, 2003, around 6:35 p.m., the Appellant was involved in a one-vehicle accident in Macon County while traveling with her fourteen-year-old son. The Ford Bronco the Appellant was driving ran off the right side of the road, ran up an embankment, rolled over twice, and landed on its roof. When emergency personnel arrived on the scene, they found the Appellant trapped inside the Bronco, which was upside down and teetering on the edge of an embankment. The Appellant's son had been ejected from the vehicle. As emergency personnel worked to free the Appellant from the wreckage, she struggled and yelled obscenities at them. She continued to kick, flail, and curse them even after they freed her from the vehicle and were attempting to strap her onto a spine board. The Appellant was transported by ambulance to Trousdale Medical Center and then life flighted to Vanderbilt University Medical Center as a result of injuries to her face and head.

While the Appellant was being extracted from her vehicle, Phyllis Tower, an employee of the ambulance service, was attending to the Appellant's son, who was found in the roadway near the wreckage. As a result of his ejection from the vehicle, he suffered a shoulder injury. He appeared upset and excited, and Tower ascertained that he had an elevated heart rate. In response to Tower's questions, the boy responded that "[h]e . . . knew that they were going to wreck. He asked his mother to pull over, and that she had been drinking, and then before she pulled over, she wrecked, and he was ejected."

Trooper Carter of the Tennessee Highway Patrol was dispatched to the wreck scene. The Trooper had no contact with the Appellant or her minor son, as both were receiving medical treatment in the ambulance. Upon investigation, Carter found a pint bottle of Wild Turkey, half-full, and an opened can of Busch Light beer inside the vehicle, which had either been consumed or was spilled during the wreck. Following the issuance of a citation for DUI, the Appellant's medical records from Vanderbilt University Medical Center were obtained by subpoena for use at the general sessions preliminary hearing.

On June 7, 2004, a Macon County grand jury returned a five-count indictment charging the Appellant with: (1) DUI; (2) failure to notify the Department of Safety of an address change within ten days; (3) driving without a seatbelt; (4) driving with an unrestrained minor in the vehicle; and (5) driving without insurance. Prior to trial, counts two, four, and five were dismissed. A bench trial on the remaining counts was held on January 26, 2005. At trial, over defense objection, the ambulance attendant who had treated the Appellant's son was allowed to testify to the statement given by the son that he knew the wreck was imminent because his mother had been drinking. Moreover, the State introduced portions of the Appellant's medical records from Vanderbilt University Medical Center, which contained the results of a blood alcohol test for ethyl alcohol, administered on November 21, 2003, at 20:53, which indicated that the Appellant's blood alcohol level was 183 mg/dL. Also introduced was a section entitled "History of Present Illness," which included the statement, "By report, [the Appellant] had previous alcohol intake." Following the presentation of evidence, the Appellant was found guilty of DUI but found not guilty of the seat belt

violation. She was subsequently sentenced to a term of eleven months and twenty-nine days, suspended after service of two days in jail. Following the denial of her motion for new trial, the Appellant filed the instant timely appeal.

**Analysis**

On appeal, the Appellant has raised two issues for our review: (1) whether the trial court erred in admitting into evidence (a) her son's statement to the ambulance attendant and (b) her medical records in violation of her Sixth Amendment right to confront witness against her, under the holding of *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374, and her right under article I, section 9 of the Tennessee Constitution to "meet the witnesses face to face," under the holding of *Maclin,* 183 S.W.3d at 343; and (2) whether the court erred in allowing an unqualified witness to testify regarding the testing of the blood alcohol content.

**I. Admission of Evidence**

As a general rule, questions concerning the admissibility of evidence are left to the sound discretion of the trial court, and this court will not overturn a trial court's determination in this regard in the absence of an abuse of discretion. *Maclin*, 183 S.W.3d at 342; *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). However, the issue of whether the admission of hearsay evidence violated a defendant's rights under the Confrontation Clause is purely a question of law. *Maclin*, 183 S.W.3d at 342 (citing *Lilly v. Virginia*, 527 U. S. 116, 125, 119 S. Ct. 1887, 1894 (1999)). The application of the law to the facts found by the trial court is a question of law that this court reviews *de novo*. *Id*. at 343 (citing *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997); *Beare Co. v. Tenn. Dept. of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993)).

It is basic that the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." It is applicable to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1067 (1965). Additionally, the Tennessee Constitution Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to meet the witnessess face to face . . . ." TENN. CONST. art. I, § 9.

It would appear upon first impression that in a criminal prosecution an incriminating out-of-court statement or the admission of hospital records, which are introduced not by a person but by a certificate, without the opportunity to cross-examine the technician performing the test, or to examine the procedures which were followed or the results obtained, would violate a defendant's right of confrontation. However, in *Crawford*, the Supreme Court, in determining the admissibility of hearsay evidence within the constraints of the Confrontation Clause, clearly recognized that the right to confront one's accuser is not absolute. *See Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. The Court concluded that the Confrontation Clause was only intended to protect a defendant from testimonial hearsay statements, not all statements that are hearsay. *Id*. In rejecting a bright-line "testimonial" definition, the *Crawford* Court nonetheless provided guidance by providing three

examples or "formulations" which qualify a hearsay statement as "testimonial": (1) *ex parte* in-court testimony or its functional equivalent such as affidavits, custodial examinations, prior testimony which a defendant was unable to cross-examine, or similar pre-trial statements which declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances which would lead an "objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 51-52, 124 S. Ct. at 1364. The Court noted that, at a minimum, the term "testimonial statements" applied to police interrogations and "[s]tatements taken by police officers in the course of interrogations." *Id*. at 52; 124 S. Ct. at 1364. In contrast, the Court noted that a casual comment to an acquaintance, business records, or statements in furtherance of a conspiracy are not testimonial. *Id*. at 51, 56, 124 S. Ct. at 1364, 1367. The Tennessee Supreme Court has also observed that business records are non-testimonial in nature and do not violate the defendant's right of confrontation. *Maclin*, 183 S.W.3d at 346.

The Court in *Crawford* reaffirmed that the standard to be applied for determining admissibility of non-testimonial hearsay remained the standard articulated in *Ohio v. Roberts*, which permitted admission of an unavailable witness' statement against a defendant if the statement bore "adequate 'indicia of reliability.'" *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374; *Ohio v. Roberts*, 448 U.S. at 66, 100 S. Ct. at 2539. Thus, to meet that test, the evidence must bear an adequate indicia of reliability, which is measured by whether the evidence falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. at 66; 100 S. Ct. at 2539.

The Tennessee Supreme Court, following the decision of *Crawford*, has held that a testimonial statement "involves a formal or official statement made or elicited with a purpose of being introduced at a criminal trial." *Maclin*, 183 S.W.3d at 346. The court noted that the implication of *Crawford* "is that statements made to police while they are performing an 'investigative and prosecutorial function' are testimony." *Id*. "The common denominator in . . . determining whether a particular statement to a police officer is 'testimonial' is whether the declarant was acting in the role of a 'witness' at the time the statement was made." *Id*. at 348-49.

**a. Excited Utterance**

Following the guidance of *Crawford* and *Maclin*, we are first required to determine whether the Appellant's son's statement to the ambulance attendant constituted "constitutional" hearsay. At trial, the ambulance attendant testified as follows:

> [The Appellant's son] said he knew that they were going to wreck. He asked his mother to pull over, and that she had been drinking, and then before she pulled over, she wrecked, and he was ejected.

The trial court admitted the statement as an excited utterance after hearing the following testimony:[1]

> [Prosecutor] Q: What gave you that feeling that he was upset? What gave you that determination that he was upset?
>
> [Tower] A: Just with talking with him. I mean, he had been thrown out of the vehicle.
>
> . . . .
>
> [Prosecutor] Q: Okay, and describe for me his condition in talking to you. You said he seemed excited. What gave you that impression?
>
> [Tower] A: It's just the tone of his voice, and his heart rate was up. Now that could have been due to his pain, but he just appeared to be anxious to me.

The initial determination in this Confrontation Clause challenge is whether the Appellant's son's statement is testimonial because, if so, then it must be excluded unless (1) he is unavailable and (2) the Appellant had a prior opportunity to cross-examine him. *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374; *Maclin*, 183 S.W.3d at 351. In *Crawford*, the Court offered three illustrations of testimonial statements, but, clearly, two of the categories do not apply to the statement at issue in this case, specifically those regarding "ex parte in-court testimony" and "extrajudicial statements" such as affidavits or depositions. Thus, we must examine the Appellant's son's statement to determine if it was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52, 124 S. Ct. at 1364. We note that the Appellant does not contest the finding that the statement was in fact an excited utterance, only that it's admission violated the Confrontation Clause.

The ambulance attendant was dispatched to the scene of a motor vehicle accident and found the Appellant's fourteen-year-old son sitting in the roadway. He had sustained an injury to his shoulder, he complained of pain, his heart rate was up, and he appeared anxious. The attendant asked him questions in order to provide medical treatment. Clearly, the attendant was at the scene to offer medical assistance, not to gather information to be used in a later prosecution of the boy's mother. We conclude from the totality of the circumstances that an objective witness in the son's position would not have considered the possibility that his statement might later be used to prosecute his mother for a criminal offense. Thus, the minor son was not acting as a "witness" giving "testimony." *See State v. Charles L. Williams*, No. M2005-00836-CCA-R3-CD (Tenn. Crim. App. at Nashville, Nov. 29, 2006) (statement by a four-year-old child identifying defendant as the perpetrator was nontestimonial excited utterance because it was made to the child's mother, in their bathroom, in response to general questioning regarding cause of pain).

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[1] An excited utterance is defined as a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Tenn. R. Evid. 803(2).

Having determined that the statement is nontestimonial, we next are required to determine whether the statement may be admitted in accordance with the standard set forth in *Ohio v. Roberts*. As noted above, under *Ohio v. Roberts*, an out-of-court statement is admissible if it bears an adequate indicia of reliability, specifically, if it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S. at 66, 100 S. Ct. at 2539. Both the United States and Tennessee Supreme Courts have held that the excited utterance exception is a firmly rooted hearsay exception. *Maclin*, 183 S.W.3d at 353 (citing *White v. Illinois*, 502 U.S. 346, 355 n.8, 112 S. Ct. 736, 742 n.8 (1992); *State v. Taylor*, 771 S.W.2d 387, 393-94 (Tenn. 1989)). Thus, we conclude that the trial court's admission of the Appellant's son's statement to the ambulance attendant was not error.

**b. Medical Records**

The Appellant also argues that the admission of her medical records from Vanderbilt University Medical Center violated her right of confrontation. The Appellant, who suffered a minimal closed head injury, a fractured jaw, and a compression fracture to her spine, was taken to Vanderbilt for treatment of her injuries. Portions of the records were introduced at trial, including laboratory results indicating a blood alcohol level of 183 mg/dL and a "comment section" containing the Appellant's statement made to medical personnel that she had consumed alcohol prior to the accident. On appeal, the Appellant contends that the records are testimonial evidence based upon: (1) the hospital's policies, which were adopted in anticipation of litigation, such as refusing to draw a blood sample at the request of law enforcement due to the hospital's wish to avoid becoming ensnared in court proceedings; (2) the fact that the affidavit of the custodian of records was prepared specifically for trial; and (3) the fact that she was treated under circumstances which "would lead an objective witness reasonably to believe that his or her statements would be available for use at a later trial." She asserts that admitting the records and laboratory reports prevented her from examining "the procedure used in drawing the blood, the methodology used to test the blood, who tested the blood, and whether the 'ETOH' results were in fact blood results." She also argues that she was denied the opportunity to challenge the "chain of custody" prior to admission of the lab results. The State contends that the records were not testimonial and were properly admitted pursuant to the business records exception.

The "Medical Records Act of 1974" imposes upon hospitals a statutory duty to prepare and maintain records of regularly conducted activity. T.C.A. § 68-11-302, *et seq*., (2006). The Act provides in relevant part:

> All hospitals, their officers or employees, and medical and nursing personnel practicing in the hospitals, shall with reasonable promptness prepare, make and maintain true and accurate hospital records, including records pertaining to abortions as provided in § 39-15-203, complying with the methods, minimum standards, and contents thereof as may be prescribed by rules and regulations adopted by the board.

T.C.A. § 68-11-303(a). The Act further states that:

> "Hospital records" means those medical histories, records, reports, summaries diagnoses, prognoses, records of treatment and medication ordered and given, entries, x-rays, radiology interpretations, and other written electronic, or graphic data prepared, kept, made or maintained in hospitals that pertain to hospital confinements or hospital services rendered to patients admitted to hospitals or receiving emergency room or outpatient care[.]

T.C.A. § 68-11-302(5)(A).

The records in this case were actually obtained from the hospital pursuant to the provisions of the Hospital Records as Evidence Act, Tennessee Code Annotated section 68-11-401, *et seq*., (2006), which permits the records to be secured by means of a subpoena *duces tecum*, with the records being delivered to the clerk of the court accompanied by an affidavit of the custodian of the records, as required by Tennessee Code Annotated section 68-11-405.

Preliminarily, we would note that the Medical Records Act, when read in conjunction with the Hospital Records as Evidence Act, is the functional equivalent of the business records exception to the hearsay rule. *See* Tenn. R. Evid. 803(6); *see also State v. Steve Gass*, No. M2000-02008-CCA-R3-CD (Tenn. Crim. App. at Nashville, Jan. 9, 2002). Both impart, with reasonable promptness, the duty to prepare and maintain accurate business or hospital records within the regular course of conducted activity. *See* T.C.A. § 68-11-303(a); Tenn. R. Evid. 803(6).[2] Accordingly, with regard to purpose and application, the two are congruent.

There is no dispute that the medical records in this case are nontestimonial. As previously noted, both *Crawford* and *Maclin* make clear that business records are nontestimonial evidence within the scope of a Confrontation Clause challenge. *Crawford*, 541 U.S. at 56, 124 S. Ct. at 1367; *Maclin*, 183 S.W.3d at 346. The Appellant's arguments with regard to the hospital's policies and the fact that the affidavit was prepared for the purpose of trial are clearly misplaced. The tests were conducted by the hospital for the purpose of providing medical treatment to the Appellant, not for the purpose of preparing for future litigation. The records were not prepared at the request of the police, nor were the tests performed by a police laboratory.

Thus, having determined that the records were nontestimonial, we, in turn, examine their admissibility under *Ohio v. Roberts*. We would first observe that neither the Hospital Records as Evidence Act, nor the business records exception to hearsay rule, standing alone make business records automatically admissible. The business records must satisfy the general rules of evidence, as well as the statutory conditions required for admissibility. After the proper foundation for

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[2] In *State v. Goldston*, 29 S.W. 3d 537, 541-41 (Tenn. Crim. App. 1999), this court held that hospital records concerning blood tests results from the hospital lab were properly admitted under the business records exception to the hearsay rule in a DUI prosecution. However, the defendant's right to confrontation was not raised as an issue, as the medical pathologist and director of the hospital laboratory testified at trial concerning the defendant's hospital records following his admission to the hospital, and the attending physician, who ordered the blood alcohol testing, testified with regard to the test results.

admission is laid, the burden is on the party opposing the introduction to establish the records' inadmissibility or lack of trustworthiness. Under the business records exception, the trustworthiness of the medical record is presumed. *See State v. Harvey Phillip Hester*, No 03C01-9704-CR-00144, (Tenn. Crim. App. at Knoxville, Mar. 22, 2000). Although the Appellant argued both pretrial and at trial that the medical and laboratory reports were inadmissible, no proof was presented at either opportunity contesting the trustworthiness of the reports or with regard to whether the evidence satisfied the requirements of the business records exception. In *Alexander v. Inman*, the Tennessee Court of Appeals observed:

> Tenn. R. Evid. 803(6) embodies the exception to the hearsay rule commonly known as the business records exception. It rests on the premise that records regularly kept in the normal course of business are inherently trustworthy and reliable. *Hill v. National Life & Accident Ins. Co.*, 11 Tenn. App. 33, 37-38 (1929); 5 John H. Wigmore, *Evidence in Trials at Common Law* § 1522 (James H. Chadbourn rev. 1974); Neil P. Cohen et al., *Tennessee Law of Evidence* § 803(6).1 (2d ed. 1990) ("Tennessee Law of Evidence").

903 S.W.2d 686, 700 (Tenn. Ct. App. 1995), *rev'd on other grounds*, 974 S.W.2d 689 (Tenn. 1998).

Based upon the authority of *Maclin* and Tenn. R. Evid. 803(6), we adhere to the majority rule among state courts, as expressed by the holding in *Baber v. Florida*, 775 So.2d 258, 263 (Fla. 2000), that "a hospital record of a blood test made for medical purposes, which is maintained by the hospital as a medical or business record, may be admitted in criminal cases pursuant to the business record exception to the hearsay rule." Moreover, as stated in *Baber*, "[w]e emphasize, however, that defendants must be given a full and fair opportunity to contest the trustworthiness of such records before they are submitted into evidence." *Id.*

With regard to this latter requirement, we note that Tenn. R. Evid 803(6) provides that the business record may be obtained by "certification" that complies with the self-authentication rule of Rule 902(11). Rule 902(11) provides:

> A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Tenn. R. Evid. 902(11).

In contrast, the provisions of the Hospital Records as Evidence Act require that the subpoenaed records "shall remain sealed and shall be opened only at trial . . . [,]" as provided by

Tennessee Code Annotated section 68-11-404(a),[3] thus, denying the defendant the opportunity to counter the proof. Moreover, subpoenaing the custodian of the hospital records for appearance at trial, as authorized by Tenn. R. Evid. 803(6), would also deny the opposing party access to the records prior to their introduction. Accordingly, obtaining the records pursuant to the Hospital Records as Evidence Act or by subpoenaeing the custodian of the hospital records, as permitted by Tenn. R. Evid 803(6), could potentially require a continuance of the case to permit "inspection" of the records and a "fair opportunity to challenge them."[4] Although it is arguable that a criminal defendant could obtain his or her own records from a hospital, it is equally obvious that the defendant's admission to the hospital could have produced voluminous records and reports during treatment, most being non-material to the prosecution. Furthermore, the criminal defendant, as opposed to a party in a civil action, is typically not in a position to utilize discovery depositions to contest factual issues prior to trial. Thus, fundamental fairness requires that the defendant be given a full and fair opportunity to contest the relevance, foundational requirements, and trustworthiness of such records before they are admitted into evidence, particularly when the record establishes an essential element of the offense. We conclude that the self-authentication provisions of Tenn. R. Evid. Rule 902(11) satisfy this requirement.

Having determined the medical records are non-testimonial, we turn to the requirements of *Ohio v. Roberts*, which have been met in this case because both the federal and state courts have repeatedly held that the hearsay exception for business records is firmly established. *Ohio v. Roberts*, 448 U.S. at 66 n.8, 100 S. Ct. at 2539 n.8 (business records exception "would seem to be among the safest of the hearsay exceptions"). Accordingly, it was not error to admit the hospital records which included the blood alcohol test results.

## II. Testimony Regarding Blood Alcohol Testing

Last, the Appellant complains that the trial court "erred by allowing Trooper Carter to offer his opinion as to what the hospital toxicology note meant with regard to how the blood is analyzed, measured, and converted from a measurement of weight to volume (milligrams per deciliter) to a

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[3] In *State v. Craig S. Cook*, No. M2002-02460-CCA-R3-CD (Tenn. Crim. App. at Nashville, Dec. 9, 2004), this court noted the patient's right to privacy in the contents of his or her medical records when subpoenaed under the provisions of the Medical Records Act. Although the records may be subpoenaed for use in a criminal proceeding, as authorized by Tennessee Code Annotated section 68-11-402(a), statutory safeguards are in place to protect the confidentiality of the records, including the requirement that the "records shall remain sealed and [be] opened only at the time of trial . . . under the direction of the judge." T.C.A. § 68-11-404(a). In *Cook*, the patient's privacy rights were indiscriminately breached. *See also State v. Terry A. Hawkins*, No. M2002-01819-CCA-R3-CD (Tenn. Crim. App. at Nashville, Apr. 6, 2004) (medical records improperly opened in violation of patient's privacy rights). Again, in this case, the Criminal Court Clerk permitted the State Trooper access to the sealed records, in violation of the statute. In view of the ongoing infractions all within this same judicial district, we instruct the criminal court judges to inform the clerks of the Fifteenth Judicial District as to their statutory duties with regard to sealed records in order to prevent this reoccurrence.

[4] Availability of the hospital records at trial was not an issue in this case because the records were introduced at the preliminary hearing and were re-subpoenaed from the hospital by the State for use at trial.

percentage of blood as required by T.C.A. § 55-10-401(a)(2)." According to the Appellant, it was error because "Trooper Carter had no certification for this analysis, did not learn this analysis in classes, but was told this by a doctor in Bedford County whose brother was killed by a drunk driver." The State counters that Trooper Carter's "testimony did not require the positing of an expert opinion" as he testified based solely on "a simple working knowledge of the metric system [which] does not amount to specialized knowledge." Our review of the record leads us to the conclusion that neither argument is correct.

We agree that the record fails to support the State's argument that the Trooper was qualified to offer his opinion as a lay witness regarding the Appellant's blood alcohol test results, including the metric comparison of the Vanderbilt lab results with the permissive inference standard of "eight-hundreds of one percent (.08%) or more" as set forth in Tennessee Code Annotated section 55-10-401(a)(2) (2006). The record established that Carter's limited testimony was not rationally based upon his own perception or knowledge,[5] but rather, as alleged by the Appellant, upon the knowledge of "a doctor in Bedford County whose brother was killed by a drunk driver." Nonetheless, in contrast to the Appellant's assertions, the record also reflects that the Trooper never offered any opinion with regard to the Appellant's blood alcohol test results. *See* Tenn. R. Evid. 704. He simply testified that the Vanderbilt lab report established that the Appellant's blood alcohol level was "183 milligrams per deciliter." The record indicates that it was the trial court who performed the metric conversion in the case. Accordingly, this issue is without merit.

## CONCLUSION

Based upon the foregoing reasons, the Appellant's conviction for driving under the influence is affirmed.

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DAVID G. HAYES, JUDGE

[5] A lay witness may testify to opinions or inferences which are: (1) rationally based upon the witness' perception; and (2) helpful in providing a clear understanding of the witness testimony or the determination of a fact at issue in the case. Tenn. R. Evid. 701.